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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE

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MARC MARTEL

v.

COMPUTER SCIENCES CORPORATION

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\* 17-cv-407-SM

\* April 4, 2019

\* 11:35 a.m.

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TRANSCRIPT OF MOTION HEARING  
BEFORE THE HONORABLE ANDREA K. JOHNSTONE

APPEARANCES:

For the Plaintiff:

Brooke Lois Lovett Shilo, Esq.  
Heather M. Burns, Esq.  
Lauren S. Irwin, Esq.  
Upton & Hatfield, LLP

For the Defendant:

F. Daniel Wood, Esq.  
The Kullman Firm

Natalie Laflamme, Esq.  
Sulloway & Hollis, PLLC

Court Reporter:

Susan M. Bateman, LCR, RPR, CRR  
Official Court Reporter  
United States District Court  
55 Pleasant Street  
Concord, NH 03301  
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1 P R O C E E D I N G S

2 THE CLERK: This Court is now in session and has  
3 before it a motion hearing in 17-cv-407-SM, Martel versus  
4 Computer Sciences Corporation.

5 THE COURT: Okay. Good morning everyone.

6 What I would like to do is start by asking the  
7 parties and counsel to identify themselves for the record,  
8 please.

9 MS. LOVETT SHILO: Your Honor, Brooke Shilo for Mr.  
10 Martel, the plaintiff.

11 I'm here with Heather Burns and Lauren Irwin.

12 THE COURT: Okay. Good morning.

13 MR. WOOD: Your Honor, I'm Daniel Wood with the  
14 Kullman Firm representing Computer Sciences Corporation.

15 MS. LAFLAMME: I'm Natalie Laflamme with Sulloway &  
16 Hollis and I also represent Computer Sciences Corporation.

17 THE COURT: Okay. All right. So I have read the  
18 filings, and I have some things that I would like to have the  
19 parties clarify.

20 So I just want to make sure that I am correct in  
21 understanding that the dispute here revolves around the  
22 investigation report and that's what we're focused on today.

23 MS. LOVETT SHILO: Your Honor, the investigation  
24 report and the documents identified in the defendant's  
25 privilege log concerning the investigation. So there's an

1 investigation report and several associated documents.

2 THE COURT: Okay. So there are associated  
3 documents in addition. All right. So that wasn't clear to  
4 me. It appeared that the dispute was surrounding the report  
5 itself only, but there are other documents related to the  
6 report?

7 MS. LOVETT SHILO: There are about 220 pages worth  
8 of documents identified in the defendant's privilege log, and  
9 those documents are the investigation report, several e-mails  
10 forwarding communications about Mr. Martel's ethics  
11 complaint, interview notes related to the investigation.

12 THE COURT: Attorney Wood, was that your  
13 understanding of what the scope of the dispute was as well?

14 MR. WOOD: Well, your Honor, I'm not sure that's  
15 specified in the motion at all, but that is an accurate  
16 description of what is contained on the privilege log.

17 What was produced in the case already has been  
18 documents that were not generated as a result of the  
19 investigation but might be considered as factual information.

20 So there was a response to the request before the  
21 Court, which are No. 9 and 14. Those documents with the  
22 purely factual information have been produced and only the  
23 documents that constitute confidential communications to or  
24 from counsel for the purpose of providing legal advice or  
25 assistance to the company, those have been withheld but they

1 have been disclosed on the privilege log.

2 THE COURT: Okay. So the referenced e-mails and  
3 the referenced interview notes that you're talking about,  
4 those are things that you've identified as being  
5 attorney-client communication or work product?

6 MR. WOOD: Yes, your Honor. And it is also  
7 important to note that the motion does not challenge the  
8 privilege. Rather, it asserts that there's been a waiver.

9 THE COURT: That was one of the other questions  
10 that I was going to ask.

11 So I want to make sure that I'm also clear that  
12 from the plaintiff's perspective you haven't challenged their  
13 designation of the materials being privilege, you're simply  
14 saying there's been an implied waiver?

15 MS. LOVETT SHILO: That's correct, your Honor.

16 THE COURT: All right. So my question for you is  
17 this. What I understand the defendants are saying is that  
18 the report and the 220 pages of materials that they have  
19 designated as privileged, either attorney-client or work  
20 product, they don't intend to use to establish any of their  
21 affirmative defenses.

22 Why doesn't that resolve the dispute?

23 MS. LOVETT SHILO: Your Honor, we, you know,  
24 understand that the defendant has suggested that, but their  
25 language in their suggestion has been a little bit less than

1 clear.

2           So in their objection, which is now document  
3 No. 25, paragraph 19, they say, "Here, CSC can establish the  
4 defense cited by plaintiff with evidence of its Equal  
5 Employment Opportunity Policy, Code of Business Conduct,  
6 employee acknowledgments, training practices, etc. CSC has  
7 not asserted nor suggested that it is relying on advice of  
8 counsel in order to establish a good faith defense."

9           But cases including Cooper, which is a case that  
10 was decided by a District of New Hampshire judge although it  
11 was a Rhode Island case, and the cases cited by CSC, Fraser  
12 and Williams, all of those cases suggest that the privilege  
13 is not waived when the defendant has affirmatively  
14 represented that they will not use or seek to use the  
15 information in -- the requested information in trial or in  
16 subsequent --

17           THE COURT: But don't those cases all deal with a  
18 circumstance where there has been an Ellerth-Faragher  
19 affirmative defense raised? And how does this good faith  
20 that you've cited -- as I understand it, the affirmative  
21 defense that you're focused on is affirmative defense No. 6.  
22 How is that an Ellerth-Faragher defense? Isn't the good  
23 faith defense raised in connection with punitive damages  
24 risk?

25           MS. LOVETT SHILO: Your Honor, two points on that.

1 In the Cooper case the Court was deciding based on asserting  
2 or proving its good faith and Faragher-Ellerth defenses. So  
3 in that case there was a good faith defense and a  
4 Faragher-Ellerth defense.

5 Also, I would like to direct the Court to the  
6 defense's response to Mr. Martel's charge of discrimination.  
7 I have a copy for you if that would be helpful.

8 But in that response on page 4 they have a section  
9 titled EEO Policy and RIF Justification, and in that they  
10 state that, "The company maintains an equal opportunity  
11 policy which states in part," and then it goes on to state  
12 that, you know, discrimination over the age of 40 will not be  
13 tolerated.

14 CSC then writes, "Employees may use CSC's open door  
15 policy for complaints concerning suspected violations of the  
16 EEO policy. To that end, employees may," and it lists a  
17 number of people that reports could be raised with,  
18 "including contacting CSC's Ethics and Compliance Office or  
19 using CSC OpenLine, which is a confidential resource for  
20 seeking ethics advice and reporting misconduct. The same  
21 channels are also available for employees with ethics  
22 complaints or suspected violations of CSC's Code of Business  
23 Conduct."

24 In the next paragraph it continues, "As discussed  
25 below, prior to the termination of his employment Martel made

1 two internal complaints containing many of the same  
2 allegations as his discrimination charge, including that he  
3 believed he was targeted for the RIF because of his age. Mr.  
4 Martel's complaints were fully investigated by CSC, and the  
5 company found no evidence to support his contention that age  
6 was a factor in the RIF decision."

7 THE COURT: Okay. So is it your position that that  
8 disclosure in the Human Rights Commission process is also a  
9 basis for the Court to find an implied waiver?

10 MS. LOVETT SHILO: Your Honor, it suggests that CSC  
11 is asserting a good faith defense based upon its  
12 investigation of Mr. Martel's complaint.

13 THE COURT: Okay. All right.

14 Attorney Wood, what's your response to that?

15 MR. WOOD: Your Honor, the defendant can and will  
16 prove good faith by showing that its conduct was actually  
17 lawful. That the plaintiff was laid off as a result of a  
18 business reorganization and a reduction in force that was  
19 legitimate, bona fide, and nondiscriminatory.

20 Also, the defendant can establish good faith by  
21 showing that it maintains an appropriate equal employment  
22 opportunity policy. That the decision maker in this case was  
23 aware of that policy and believed or had no reason to believe  
24 that there was any violation of that policy in the decision  
25 that it made.

1           We're not relying on confidential or privileged  
2     communications or materials that were generated for the  
3     purpose of providing legal advice to the company in order to  
4     establish that defense.

5           In answer to the Court's question and the assertion  
6     just now by the plaintiff, I'm not sure that that report  
7     would be admissible for any reason -- excuse me, not report,  
8     the response to the charge.

9           The pleadings here that have been joined, defendant  
10    has stated simply to clarify its response to the plaintiff's  
11    allegation that he was notified of the layoff but then  
12    because he had a complaint that was still pending his layoff  
13    was postponed. We have answered that by saying we admit that  
14    with clarification that there was no substantiation for the  
15    assertion of any improper or unlawful conduct. That is the  
16    extent of the allegation in the pleadings in this case.

17           THE COURT: What do the applicable policies say  
18    about investigation?

19           MR. WOOD: In terms of what, your Honor?

20           THE COURT: In terms of whether an investigation  
21    would be conducted.

22           MR. WOOD: I think there is language both in an  
23    equal employment opportunity and any type of ethics  
24    materials, like a code of business conduct --

25           THE COURT: Okay.



1 MR. WOOD: -- that state that there are avenues  
2 through which an employee may raise concerns and that those  
3 concerns will be appropriately addressed.

4 THE COURT: Okay. So what I understand the  
5 plaintiffs are concerned about in part is that if your  
6 defense in this case is we have policies and we followed --  
7 we implemented those policies and followed those policies in  
8 good faith and there's something that was either defective or  
9 deficient in the way that Mr. Martel conducted himself in  
10 accordance with those, doesn't it beg the question that Mr.  
11 Martel is going to need to let someone know in the course of  
12 this trial, if it goes to trial, that he in fact lodged a  
13 complaint or followed these policies?

14 MR. WOOD: Your Honor, I guess one caveat is that  
15 we don't at this point know what the plaintiff's testimony  
16 will be, but beyond that caveat I think the important  
17 distinction is that the good faith defense may be established  
18 by saying this decision maker was aware of the policies and  
19 did not think there was any violation. That would constitute  
20 evidence that establishes a good faith belief that the action  
21 did not violate any age discrimination laws.

22 What the plaintiff seems to be asserting is that,  
23 as in a Faragher context, we might delve into the  
24 reasonableness, that is, the content of the investigation  
25 itself, and that's not been asserted.

1 THE COURT: Well, in a Faragher context wouldn't it  
2 also be that you could be delving into whether or not the  
3 plaintiff had availed himself of your policies appropriately?

4 MR. WOOD: Yes, your Honor, but there is no  
5 contention here that Mr. Martel failed to complain about his  
6 layoff. He did.

7 THE COURT: Okay. What's the plaintiff's response?

8 MS. LOVETT SHILO: Your Honor, just to be clear,  
9 Mr. Martel made a first complaint prior to his layoff that  
10 was largely about his 2014 performance evaluation in that in  
11 our motion to compel discovery, document number 24, there's a  
12 statement that prior to Mr. Martel's termination he filed an  
13 internal ethics complaint which included a complaint of age  
14 discrimination.

15 There were actually sort of two components to that  
16 complaint. So the first one was before he was terminated and  
17 it concerned primarily his 2014 performance evaluation. He  
18 was then terminated. He then made another communication to  
19 the ethics line expanding on his complaint, and that is the  
20 first time that an explicit complaint of age discrimination  
21 was made. So just to clarify for the Court, that paragraph  
22 may be misleading.

23 To respond to the Faragher-Ellerth issue, that's  
24 not what we're arguing here. We're arguing that in the good  
25 faith defense that the defendants have raised they seem to be

1 relying on their EEO policy which necessarily implies Mr.  
2 Martel's ethics complaint pursuant to that policy.

3 We also have asserted in our reply that we  
4 anticipate Mr. Martel will testify that he filed a complaint  
5 with CSC's ethics line, that he understood that his complaint  
6 was investigated, and that he was never communicated the  
7 results of the investigation.

8 THE COURT: Okay. So I'm just going to stop you  
9 there for a moment.

10 Let's assume that testimony comes in. What's the  
11 defendant's position on where we go from there?

12 MR. WOOD: I think that the defendant -- if that  
13 were the case, the defendant could dispute the allegation  
14 that there was no investigation.

15 THE COURT: No, they said there was an  
16 investigation and he was never made privy to the outcome of  
17 that investigation.

18 MR. WOOD: They could dispute the notion that he --  
19 or the assertion that he was not made aware of the outcome of  
20 the investigation as well.

21 THE COURT: Meaning, I think you're saying, we  
22 upheld the decision to lay him off?

23 MR. WOOD: There could be testimony that he was in  
24 fact notified of the outcome of the investigation.

25 THE COURT: All right. You're looking -- you want

1 to respond. Go ahead.

2 MS. LOVETT SHILO: Your Honor, we have no  
3 information that our client was ever communicated results of  
4 an investigation in this matter, and I think that goes back  
5 to the point of -- if Mr. Martel testifies, as we anticipate  
6 he will, the investigation will come up and it will come up  
7 in the context of trial. And there's strong case law in the  
8 First Circuit citing U.S. Supreme Court cases saying that the  
9 deposition discovery rules were designed to essentially  
10 prevent surprises at trial by permitting discovery --

11 THE COURT: But I'm not hearing the defendants say  
12 they're going to produce the report or that they're going to  
13 disclose any of the contents of the report. It sounds like  
14 what they're saying is the dispute might be as to whether or  
15 not there was a communication with your client communicating  
16 something to him, either that the investigation was over, a  
17 conclusion from the report, I have no idea what their  
18 position is, but it doesn't sound like what they're saying is  
19 we would produce the report or use the report.

20 MS. LOVETT SHILO: Right. Your Honor, in order to  
21 be fair, if they are going to argue that our client was  
22 informed of the outcome and what that outcome was, we're  
23 entitled to challenge the outcome and determine whether that  
24 outcome was fair.

25 THE COURT: So you want to get to the adequacy of

1 the investigation?

2 MS. LOVETT SHILO: That's correct. If the  
3 defendant will be asserting that Mr. Martel's complaint was  
4 investigated and that a conclusion was reached and that his  
5 termination was upheld.

6 MR. WOOD: Your Honor, very generally speaking, the  
7 argument that's being presented is if a defendant asserts  
8 good faith of any type or if the existence of an  
9 investigation is mentioned in any context, then the defendant  
10 has completely waived the privilege and all contents of that  
11 investigation are subject to discovery. There is no  
12 authority that supports that proposition, and that's what's  
13 being put before the Court.

14 THE COURT: Let me ask you this question. There  
15 are two investigations that are wrapped up in one. The first  
16 was an investigation into concerns regarding a performance  
17 evaluation.

18 MR. WOOD: Your Honor, that initial concern went to  
19 employee relations, which is like a human resources  
20 department.

21 THE COURT: Okay. Yeah.

22 MR. WOOD: The materials produced by those  
23 representatives that were not under direction of counsel have  
24 been produced in this case. When it got to the point in our  
25 factual chronology at which Mr. Martel asserted allegations

1 that his layoff was illegal or not ethical, at that point in  
2 time there was direction from the general counsel of the  
3 company under which we claim that these materials from that  
4 point, and to the person that received those instructions,  
5 that those materials are privilege.

6 So not only does the plaintiff have the material  
7 from employee relations prior to that date, but the plaintiff  
8 has factual information other than privileged communications  
9 that go to the underlying facts that were investigated.

10 So we have met our obligations under the rules, but  
11 we are entitled to assert privilege, and we are not using it  
12 as a sword and a shield, and therefore there isn't any  
13 authority before the Court that would compel the Court to  
14 hold that there's been a waiver.

15 THE COURT: I just want to ask you a question  
16 because it relates to the affirmative defense.

17 So the sixth affirmative defense, as I understand  
18 it, or at least -- I'm looking at document No. 25, which is  
19 the opposition to plaintiff's motion to compel. I'm looking  
20 at paragraph 8 on page 3, and you've quoted that sixth  
21 affirmative defense as saying, "Defendant did not violate the  
22 statutes cited in the complaint." And then you say,  
23 "Alternatively, defendant made good faith efforts to comply  
24 with employment related laws and any discriminatory act,  
25 omission, or decision by any managerial agent would have been

1 contrary to those efforts," and then you're referring to  
2 document No. 20 at paragraph 6.

3 So are you representing to the Court that in your  
4 -- in defendant's argument that it made good faith efforts to  
5 comply with employment related laws that you would not be  
6 relying on the fact of an investigation or the outcome of the  
7 investigation as it's set forth in that investigative report?

8 MR. WOOD: Your Honor, we have pled in response to  
9 the plaintiff's allegation that his RIF was delayed because  
10 he had a complaint to the ethics office pending. We have  
11 pled that that's true, but the complaint was investigated and  
12 determined to be without merit; that is, that there was not  
13 evidence that supported it.

14 So the existence of an investigation and the  
15 ultimate conclusion, especially if communicated to the  
16 plaintiff or acknowledged by the plaintiff, does not waive  
17 the privilege. That in and of itself is not privileged  
18 information and would be supported by the facts and the  
19 documents that have already been produced.

20 THE COURT: And your position is that somehow the  
21 fact that an investigation took place and that there was a  
22 conclusion reached doesn't open up the opportunity for the  
23 plaintiff to discover the report itself?

24 MR. WOOD: That's correct.

25 THE COURT: Under Cooper or any of the other cases

1 they've cited.

2 MR. WOOD: Walter. Right. That's correct.

3 THE COURT: Okay. What's the plaintiff's position?

4 MS. LOVETT SHILO: Your Honor, CSC is citing  
5 compliance with employment laws and that the investigation  
6 was part of their compliance with employment laws. That  
7 compliance is only in good faith if that investigation was  
8 conducted in a fair and in a good faith manner.

9 So by relying on the outcome of the investigation  
10 to support compliance with employment laws they're  
11 necessarily putting the fairness and the good faith nature of  
12 the investigation at issue.

13 THE COURT: So the other question I have, and it  
14 wasn't raised by the parties but it comes in as we look at  
15 No. 6, I would like to -- I'm struggling a little bit with  
16 one of the other affirmative defenses that relates to this  
17 issue. Just give me a moment to find the document.

18 Document No. 20. Does the defendant have their  
19 answer available to that?

20 MR. WOOD: Your Honor, I have a partial copy with  
21 handwritten notes and highlights.

22 THE COURT: All right.

23 MS. BURNS: Your Honor, do you need a copy of the  
24 answer?

25 THE COURT: I would actually like the defendant to



1 have a copy of the answer if it's document No. 20 because  
2 that's what I'm looking at.

3 MS. BURNS: We have a copy we can share.

4 THE COURT: Thank you. All right. Bear with me.

5 If you could direct your attention, Attorney Wood,  
6 to affirmative defense No. 25. Based on what you've just --  
7 what we've been talking about in terms of what the  
8 defendant's position is in this case as it relates to  
9 plaintiff's conduct in connection with the policies and  
10 procedures of the employer, I'm struggling a little bit with  
11 that and with what's in this affirmative defense.

12 MS. LOVETT SHILO: Your Honor, just to clarify, the  
13 numbering on the answer that we just gave Attorney Wood is  
14 different from what you're referencing.

15 THE COURT: I'm looking at document No. 20,  
16 affirmative defense No. 25.

17 MR. WOOD: Page 16.

18 THE COURT: Page 16. Thank you.

19 MS. LOVETT SHILO: Okay.

20 MR. WOOD: Your Honor, I believe that that wording  
21 is based on a Faragher defense.

22 THE COURT: Well, we've been talking all along that  
23 there aren't Faragher defenses so I'm a little confused.

24 MR. WOOD: Well, the challenge was based on defense  
25 No. 6 and the good faith defense.

1 THE COURT: Right, but as we've been talking  
2 about what the defendants intend to do to establish their  
3 good faith defense, you said you were going to be relying on  
4 your policies and procedures. And so that brings me to  
5 affirmative defense 25 which says, "We maintained and  
6 enforced good faith policies and procedures prohibiting  
7 unlawful discrimination."

8 MR. WOOD: That's correct, your Honor.

9 THE COURT: Okay.

10 MR. WOOD: I think the last clause in that defense  
11 is asserted as an abundance of caution. I am not aware of  
12 any evidence that would suggest the plaintiff failed to  
13 complain.

14 THE COURT: Okay.

15 MR. WOOD: And that, to clarify the issue, can be  
16 withdrawn.

17 THE COURT: Okay. And when you refer to in your  
18 sixth affirmative defense that any discriminatory act,  
19 omission or decision by any managerial agent would have been  
20 contrary to those efforts, isn't that an effort to avoid  
21 vicarious liability?

22 MR. WOOD: It would be, your Honor. I mean, that  
23 is the language that's used under that type of standard for  
24 Faragher. But again, the good faith issue follows more of  
25 the Kolstad analysis and that is the evidence that the

1 defendant will rely on. First of all, that this decision  
2 maker was aware of the policy, not only that it was properly  
3 implemented and disseminated.

4 THE COURT: That's just a training issue. That's  
5 what always happens in a good faith defense. You come forth  
6 as the defendant and you say we have these policies. We  
7 trained and educated folks on them. The managers and  
8 supervisors and individuals that were involved in the  
9 decision-making in this case all had the same training, et  
10 cetera.

11 But this affirmative defense No. 6 is a little  
12 different. It's hard for the Court not to read it in  
13 connection with No. 25 given that conclusory language, which  
14 is that any discriminatory act, omission, or decision by any  
15 managerial agent would have been contrary to those efforts.

16 MR. WOOD: The testimony -- the evidence will be  
17 specific to this, not only the general evidence that you see  
18 in all employment cases that a proper policy that prohibits  
19 discrimination was disseminated and people were educated, but  
20 that this particular decision maker was aware of that policy  
21 and had no reason to believe that the actions violated it.

22 The defendant does not intend and has said  
23 expressly to the Court that it is not going to rely on  
24 privileged communications, materials, or information in order  
25 to establish that defense.

1           THE COURT: And your position is that even if the  
2 jury were to hear any information about the fact of an  
3 investigation or that there was a complaint made consistent  
4 with those same policies that you're relying on as saying are  
5 the policies that you'll be using to make your good faith  
6 defense arguments, that because you're electing not to use  
7 that report and those other communications that are not open  
8 and available to the plaintiffs under the case law that's  
9 controlling?

10           MR. WOOD: That's correct, your Honor, because it's  
11 not the use of that material as a sword and a shield.

12           THE COURT: Okay.

13           Anything further from the plaintiff?

14           MS. LOVETT SHILO: Your Honor, I think we've stated  
15 this before, but communicating the results of the  
16 investigation without the plaintiff having an opportunity to  
17 contest the reliability of those results would be  
18 prejudicial. And if the results are introduced at trial, we  
19 believe that they're discoverable.

20           THE COURT: Can the defendants give the Court a  
21 proffer as to what it is that it believes the communication  
22 to the plaintiff was as to the outcome of the results of the  
23 investigation? If you can't do it today, we can come up with  
24 another format for you to do that. I'm not trying to put you  
25 on the spot, but I think it may be important for the Court to

1 understand what the evidence is anticipated or expected to be  
2 as it relates to that.

3 MR. WOOD: I think that would be preferable, your  
4 Honor, rather than speaking to it directly today.

5 THE COURT: Okay, because that seems to be where  
6 the rubber meets the road on this based on what you've  
7 described you anticipate the evidence to be as it relates to  
8 your good faith defense and as to the issue of how the  
9 investigation is likely to come up at trial.

10 MR. WOOD: May I point out --

11 THE COURT: Yes.

12 MR. WOOD: The plaintiff's statement in the reply  
13 is that there may be evidence to this effect and in response  
14 there may be some assertion by defendant, which at this point  
15 is speculative.

16 THE COURT: I appreciate that. I think today as  
17 we've been talking about this there's been some refinement of  
18 that argument, but there's also been a refinement of your  
19 position as to how you expect and anticipate the good faith  
20 issue to evolve. And your reliance on the policies -- and I  
21 think you've conceded that the policy makes a reference --  
22 the policies at issue here that you're going to be relying on  
23 make issue to there not only being a complaint process but  
24 there being an investigative process. So that's how we sort  
25 of got to this place.

1           How much time do you need, Attorney Wood, to  
2 provide the Court with information as to what the proffer  
3 would be as to what was communicated to Mr. Wood as to the  
4 outcome of the investigation?

5           MR. WOOD: Communicated to Mr. Martel?

6           THE COURT: Excuse me. Communicated to Mr. Martel.

7           MR. WOOD: I would say two weeks, your Honor.

8           THE COURT: You can't do it any quicker than that?

9           MR. WOOD: I could try.

10          THE COURT: Okay.

11          MR. WOOD: I will certainly follow the Court's  
12 direction.

13          THE COURT: It just seems like a long time, and I  
14 want to be able to address that issue with folks.

15          So why don't we do this. What I would like to do  
16 is see if you can get that to the Court and to opposing  
17 counsel. Just the proffer. No arguments. And I'll give you  
18 time to make arguments -- both make arguments.

19          What my inclination is -- let's see, today is the  
20 4th of April. Why don't you try to get something by the 12th  
21 of April, and then what I would like to do is to give the  
22 parties an opportunity to provide the Court with whatever  
23 additional authority or argument they wish to make as it  
24 relates to that proffer and how it fits into the arguments  
25 we've been talking about today and the discoverability or

1 lack of discoverability by the 19th of April. All right?

2 Again, I just want to clarify that although there's  
3 been some reference here to Ellerth-Faragher affirmative  
4 defenses, the plaintiff's position is that it's the good  
5 faith affirmative defense that triggers your entitlement to  
6 this report and to these other communications as an implied  
7 waiver?

8 MS. LOVETT SHILO: Your Honor, that's our  
9 understanding.

10 THE COURT: All right. Okay. So that was the  
11 other thing that I wanted to make sure we were clear on.

12 I will also again just note for the record that as  
13 I understand it, Attorney Wood, you've withdrawn affirmative  
14 defense No. 25 to the extent that it includes references to  
15 the plaintiff failed to reasonably avail himself of such  
16 policies and procedures and failed to otherwise avoid the  
17 harm?

18 MR. WOOD: Yes, your Honor.

19 THE COURT: All right. Okay. Anything further?

20 MS. LOVETT SHILO: Your Honor, my colleague,  
21 Heather Burns, has an issue that she would like to raise.

22 MS. BURNS: Your Honor, we wanted to apprise the  
23 Court of the fact that we do anticipate filing additional  
24 motions to compel in this case.

25 I'm not sure we've had an opportunity to share with

1 the Court the full nature and extent of the difficulty that  
2 we've had in getting discovery in this case, but we do want  
3 to advise you of the fact that originally we propounded our  
4 first set of interrogatories and requests for production in  
5 this case on June 18, 2018.

6 It is now ten months later. We have virtually no  
7 discovery and no meaningfully interrogatory answers from CSC.

8 THE COURT: Attorney Burns, I don't want to -- in  
9 fairness to Attorney Wood who is here but may or may not have  
10 been prepared to deal with these issues today, here's what  
11 I'm going to suggest that we do. We've already had one  
12 informal conference over the phone. We now have this motion  
13 to compel which I didn't address during that informal  
14 conference.

15 It strikes me that what needs to happen is -- you  
16 have Attorney Wood physically here today. I would encourage  
17 all of you to take some time, go to one of the conference  
18 rooms that's right out here, and walk through where you are  
19 with discovery.

20 If you all want to schedule either a telephonic or  
21 an in-person discovery status conference, whether it's  
22 informal or not informal, I'm happy to do that for you.

23 Remind me, if you could, what the deadline for the  
24 close of discovery is, or are we in a place where we're in  
25 limbo with dates right now?



1 MS. BURNS: We went into limbo, your Honor.

2 THE COURT: Okay.

3 MS. BURNS: And I believe the last order from the  
4 Court that we have asks that by May 10th we set a new  
5 schedule for the balance of discovery, including a new trial  
6 date.

7 We feel absolutely unable to do that because until  
8 we get discovery from the defendants we can't start taking  
9 depositions and we can't move toward trial.

10 THE COURT: I hear you. All right.

11 MS. BURNS: Your Honor, if I could just say one  
12 other point, because I do think Attorney Wood was fully  
13 prepared to talk about this today. We had prepared a second  
14 motion to compel in this case. We sent it to Attorney Wood  
15 on March 27th. That was early last week. We indicated that  
16 we were looking for assent or for filing of the motion. He  
17 asked us to delay filing the motion. He asked us to delay I  
18 believe until last Friday. Then he indicated he still needed  
19 additional time. We asked him to get us information no later  
20 than Wednesday, being yesterday, about his position on  
21 things.

22 As has happened in every single instance in this  
23 case, we got a letter last night, at 10 o'clock last night,  
24 raising the issues, and essentially the supplement that we  
25 have gotten is still not responsive to the issues that were

1 raised in the motion to compel.

2 The letter that we got from Attorney Wood's  
3 associate, Attorney Bowdler, asks again for another meet and  
4 confer with them regarding this discovery.

5 THE COURT: He's here today so I'm going to  
6 encourage you to have that conversation. At some point in  
7 time -- you know, the Court's not prepared to address these  
8 issues today. I've got the motion to compel in front of me.  
9 That's what I was ready to do.

10 MS. BURNS: Okay.

11 THE COURT: That's what I have information on and  
12 that's what I would like to focus on today, but I am  
13 available to both sides to address these issues.

14 If we have to have regular discovery conferences to  
15 get you through discovery, I'm not happy about doing that, I  
16 don't think that that's a good use of the parties' time, but  
17 I know how to conduct discovery. I haven't been away from  
18 litigating cases that long. So I caution both sides that if  
19 the Court's time on this case outweighs the way that the  
20 Court normally handles discovery issues, it's not going to be  
21 good for either party.

22 So I'm going to encourage you while you're all  
23 physically here today to spend some time trying to work  
24 through these issues. If you can't work through them, I will  
25 gladly at the request of the parties set up a comprehensive

1 discovery status conference where both sides will have an  
2 opportunity to let the Court know where we are with  
3 discovery.

4 Attorney Wood, my sense would be, if we're going to  
5 do that, that I would expect counsel to physically come to  
6 the courthouse and for us to spend a good portion of a day  
7 going through discovery, and I typically rule comprehensively  
8 on all of the issues if we can't reach an agreement.

9 So we can set aside the things that we're going to  
10 file motions to compel on, and we can try to work through the  
11 things that we agree to.

12 I would encourage you to have your conversations.  
13 If you reach some kind of tentative agreements that you want  
14 to review with me, if I'm available, if we can get a court  
15 reporter here, I will gladly sit down with you and we can try  
16 to do that today. I do have a somewhat full schedule this  
17 afternoon, but I wouldn't mind taking advantage of Attorney  
18 Wood physically being here, but right now I'm just not in a  
19 position to respond to the discovery disputes. All right?

20 MS. BURNS: I understand, your Honor.

21 THE COURT: Thank you. I appreciate it.

22 All right. Please speak to each other and see if  
23 you can work it out. Thank you.

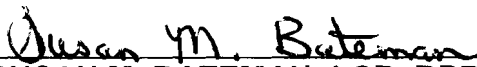
24 MR. WOOD: Thank you, your Honor.

25 (Conclusion of hearing at 12:15 p.m.)

## C E R T I F I C A T E

I, Susan M. Bateman, do hereby certify that the foregoing transcript is a true and accurate transcription of the within proceedings, to the best of my knowledge, skill, ability and belief.

Submitted: 4-29-19

  
**SUSAN M. BATEMAN, LCR, RPR, CRR**  
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